IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.1.2005

CORAM:

THE HONOURABLE MR.JUSTICE A.K.RAJAN

W.P.No.2715 of 1998

A.Saravanan .. Petitioner

-Vs-

1.The Chief Engineer/Personnel
Administrative Branch,
Tamilnadu Electricity Board,
N.P.K.Maligai, 6th floor,
Chennai-2.

2.The Superintending Engineer,
K.E.B.C. Kancheepuram
Electricity Department,
Kancheepuram. .. Respondents

Writ petition under Article 226 of the Constitution of India praying for issue of a Writ of Certiorarified Mandamus as stated therein.

For petitioner : Prof.S.Krishnaswamy
For respondents : Mr.V.Radhakrishnan

O R D E R

The prayer in the writ petition is to issue a writ of Certiorarified Mandamus, calling for the records of the first respondent in his Memo No.118088/R4/96.53 dated 13.1.1998, quash the same and direct the respondents to continue to employ the petitioner in service as Technical Assistant/Electrical in Regular Work Establishment Services of Tamil Nadu Electricity Board in the Office of the second respondent.

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2. The case of the petitioner is as follows:

(i) The petitioner is a diploma holder (First Class) in Electrical and Electronics Engineering. He belongs to Backward Community. He was selected as Trainee in S.R.P. Tools Pvt. Ltd. in SIPCOT, Ranipet for a period of one year on a monthly stipend of Rs.1,000/-. As per the terms and conditions, if discontinued, he should pay the entire stipend received with a penalty. While undergoing training, the petitioner was sponsored by the Employment Exchange for the post of Technical Assistant (Electrical) in Tamil Nadu Electricity Board. After interview, he was selected and appointed in the usual scale of pay and the Order of appointment dated 31.12.1997 was issued by the Superintending Engineer, REDC/Kancheepuram. (The Order recited that his appointment was subject to the result of W.A.Nos.1482, 1483 and 1498 of 1997). The petitioner joined duty on 3.1.1998 after settling the amounts with S.R.P.Tools Pvt. Ltd., (he repaid the stipend received with penalty for not completing the traineeship). In the Order of appointment, after his name the words 'S.C.' was found indicating the roaster of appointment. He pointed out that he was not a 'S.C.' candidate. Thereafter, he received an Office Memorandum dated 13.1.1998 that he was wrongly selected under the quota reserved for S.C. & S.T. The cut off mark for B.C. was much higher, and hence his provisional selection was cancelled. Inasmuch he was working from 3.1.1998 to 13.1.1998 he became a member of service and hence his appointment cannot be cancelled without following the procedure under the Service Rules. In fact, he was selected only under B.C. Quota; he had not suppressed any fact, he only brought to the notice that he did not belong to S.C. Community. There was several vacancies in the same post. Hence, the present writ petition to employ him in service as Technical Assistant/Electrical in Regular Work Establishment Services of Tamil Nadu Electricity Board.

3. In the counter it is stated as follows:

(a) The petitioner was sponsored by the Employment Exchange. He belongs to B.C. Community. But, he was wrongly selected under the reserved quota for S.C. He was only intimated about his provisional selection. On verification it was found out that he belonged to 'B.C.' and not 'S.C.'. Therefore, his provisional selection was cancelled. The selection itself was subject to W.A.Nos.1482, 1483 and 1498 of 1997. The recruitment was

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made on merit; the cut off marks under the non-priority BC candidate was 82.3500, whereas the petitioner secured only 72.3485 marks. But, he got more than the cut-off marks prescribed for S.C. candidate. Under the wrong impression that the petitioner belonged to 'S.C.' community, he was selected provisionally. When the mistake was found out, it was cancelled. Therefore, there is no violation of any of the Service Rule nor principles of natural justice. Hence, the writ petition is liable to be set aside.

4. The learned counsel for the petitioner submitted that the selection was made for 900 posts. Since he joined service on 3.1.1998 and continued in service till 13.1.1998, his appointment cannot be cancelled without issuing a show cause notice before such cancellation. In support of his contention the learned counsel relied upon the following judgments:

In D.L. BOARD, CALCUTTA v.. JAFFAR IMAM [AIR 1966 SC 282] the Supreme Court has held as follows:

> " There can be no doubt that when the appellant purports to exercise its authority to terminate the employment of its employees such as the respondents in the present case, it is exercising authority and power of a quasi-judicial character. In cases where a statutory body or authority is empowered to terminate the employment of its employees, the authority or body cannot be herd to say that it will exercise its powers without due regard to the principles of natural justice. The nature or the character of the proceedings which such a statutory authority or body must adopt in exercising its disciplinary power for the purpose of terminating the employment of its employees, has been recently considered by this Court in several cases: vide the Associated Cement Companies Ltd., Bhupendra Cement Works, Surajpur v. P.N.Sharma, Civil Appeal No.44 of 1964, dated 9.12.1964: (AIR 1965 SC 1595) and Bhagwan v. Ram Chand, Civil Appeal No.764 of 1964, dated 1.3.1965: (AIR 1965 SC 1767), and it has been held that in ascertaining the nature of such proceedings with a view to decide whether the principles of natural justice ought to be followed or not, the test laid down by Lord Reid in Ridge

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v. Baldwin, 1964 AC 40, are relevant. In view of these decisions, Mr.Sen has not disputed this position and we think, rightly."

In SATISH RAWAT v.. UNION OF INDIA [2002 Lab.I.C. 3273] the Punjab and Haryana High Court has held as follows:

"For the mess that arose on appointment of the appellant and not supporting it properly and for appointment of respondent No.3, the Department is entirely blameworthy. If now respondent No.3 is displaced by the appellant, he will be uprooted.

In the circumstances of the case we think that the appointment of respondent No.3 as directed by the Tribunal should not be disturbed. However, in the peculiar facts of the case as arise now, it would be proper for the Department to provide a post to the appellant and such post if not available shall be created on supernumerary basis to be absorbed when a regular vacancy arises. However, the appellant shall not be entitled to any monetary benefits for the period he had not worked. He be appointed in the post on the basis he had been originally appointed in 1992 and due benefits of increments be given to him and his pay-scale should be appropriately fixed on the basis of last pay drawn at the time of his discharge from service."

Relying upon these two decisions, the learned counsel for the petitioner submitted that since it was not the fault of the petitioner, he should be provided with an appointment creating a supernumerary post till a new vacancy arises.

5. The learned counsel for the respondents submitted that the decision of the Supreme Court in 2002 Lab.I.C. 3275 (supra) is not a ratio descedendi; it is a decision on the facts of that case. The decision cited by the counsel for the petitioner was given by the Supreme Court exercising power under Art.142 of the Constitution of India; the High Courts have no such power, and hence this Court cannot follow that judgment.

He also relied upon the following decisions:

In ALIGARH MUSLIM UNIVERSITY v.. MANSOOR ALI KHAN

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(2000 (7) S.C.C. 529) the Supreme Court has held as follows:

" As pointed recently in M.C.Mehta v. Union of India [(1999) 6 SCC 237] there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in Gadde Venkateswara Rao v.. Govt. of A.P. [AIR 1966 SC 828] it is not necessary to quash the order merely because of violation of principles of natural justice."

In STATE BANK OF PATIALA v.. S.K.SHARMA (A.I.R. 1996 S.C. 1669) the Supreme Court has held as follows:

In K.L.TRIPATHI ..VS.. STATE BANK OF INDIA (1984 I S.C.C. 43 = A.I.R. 1984 S.C. 273), SABYASACHI MUKHARJI, J., speaking for a three judge Bench, considered the question whether violation of each and every fact of principles of natural justice has the effect of vitiating the enquiry. The learned Judge observed (at P.282 of A.I.R.)

"The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept of fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person who has testified, is, in dispute, right of cross-examination must inevitable form part of fair play in action but where there is no lis regarding the facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision arrived at fairly. This is more so when the party against

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whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version of the credibility of the statement.

The party who does not want to controvert the veracity of the evidence from or testimony gathered behind his back cannot expect to succeed in any subsequent demand that there was no opportunity of cross-examination specially when it was not asked for and there was no dispute about the veracity of the statements. Where there is no dispute as to the facts, or the weight to be attached on disputed facts but only an explanation to the acts, absence of opportunity to cross-examination does not create any prejudice in such cases.

The principles of natural justice will, therefore, depend upon the facts and circumstances of each particular case. We have set out hereinbefore the actual facts and circumstances of the case. The appellant was associated with the preliminary investigation that was conducted against him. He does not deny or dispute that. Information and materials undoubtedly were gathered not in his presence but whatever information was there and gathered namely, the versions of the persons, the particular entries which required examination were shown to him. He was conveyed the information given and his explanation was asked for. He participated in that investigation. He gave his explanation but he did not dispute any of the facts nor did he ask for any opportunity to call any evidence to rebut these facts".

It was accordingly held that the enquiry held and the punishment imposed cannot be said to have been vitiated on account of an opportunity to cross-examine certain witnesses not having been afforded to him."

In SOHAN LAL GUPTA (DEAD) THROUGH LRS AND OTHERS v.. ASHA DEVI GUPTA (2003 (7) S.C.C. 492) the Supreme Court has held as follows:

"The principles of natural justice, it is trite, cannot be put in a straitjacket formula.

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In a given case, the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby. In CHAIRMAN, BOARD OF MINING EXAMINATION AND CHIEF INSPECTOR OF MINES ..VS.. RAMJEE (1977 (2) S.C.C. 256 = 1977 S.C.C. (L&S)226) this Court held : (S.C.C. p.262, para 13)

"Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt - that is the conscience of the matter".

A Division Bench of this Court in JUSTINE v.. THE REGISTRAR OF COOP.SOCIETIES, CHENNAI 10 [2002(4)CTC 385] has held as follows:

" It is true that termination of services results in civil consequences and that audi alteram partem rule has to be followed. But the theory of principles of natural justice cannot be put in a straightjacket and it is not an absolute rule that in each and every adverse order, there should be a strict adherence to the principles of natural justice. One such exception to audi alteram partem rule is absence of any legal right to defend the impugned action and in fact, such cases are covered by the 'useless formality theory' propounded by the Supreme Court in Aligarh Muslim University v. Mansoor Ali Khan, AIR 2000 SC 2783. Even for availment of the alternative remedy, a legal right should subsist and there may be some cases like the instant one where there is

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> no right accrued even at the time of entry into service and when the top administrative authority, i.e. the Government, has already taken a stand, it serves no purpose to drive a party to avail of the alternative remedy as there is absolutely no discretion for the subordinate officers of the Government to take any decision contra to the view taken by the Government."

Relying upon these judgments, the learned counsel for the respondents submitted that in this case the petitioner belongs to BC Community and admittedly the cut-off mark for BC candidates was 82.3500; whereas the petitioner obtained 72.3485 marks. Therefore, he cannot be appointed in the BC quota in that selection. Since it is only a mistake committed by the authorities while issuing the appointment Order, wrongly considering him as the member of SC community, issuance of show cause notice and reply to that show cause notice will not change the situations. Therefore, the issuance of notice is an 'useless formality', which need not be followed; non-compliance of such 'useless formality' does not vitiate the order of termination. Therefore, the writ petitioner is not entitled to any relief.

6. It is true that the Supreme Court was of the view that when a person joins service, he cannot be terminated without following the procedure contemplated under the rules and without following the principles of natural justice. That is, a person who joins service cannot be terminated without giving a show cause notice and only after considering his explanation he can be terminated.

7. The argument of the learned counsel for the petitioner is that it is his valuable right and that has been derived in this case. It is true that the Supreme Court enunciated such a theory earlier. But, later on, as seen from the decisions relied upon by the learned counsel for the respondents, the Supreme Court has enunciated the 'useless formality theory'. The issuance of show cause notice and subsequent proceedings would be only 'useless formalities' in view of the fact that no amount of explanation would affect the ultimate result. Under such circumstances, the principles of natural justice of issuing of show cause notice need not be followed. In this case,

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admittedly, the petitioner got only 72.3485 marks. Admittedly, the cut-off mark for BC selection was 82.3500. Therefore, the petitioner could not have been selected under 'BC' quota. It is only due to mistake, considering him as a 'SC' candidate, he was given an appointment order. Even in the appointment order it was specifically stated that 'it was only a provisional selection', and the appointment issued is subject to satisfying the medical examination and verification of the original certificates. But, at the same time when the mistake was found out and a person, who could not have been appointed, was appointed wrongly by mistake, there is no illegality to cancel that Order since the earlier Order was only 'provisional'. Further, issuing show cause notice will not, in any way, alter the situation as he cannot give any reply to justify his selection and appointment. Such a procedure would only for completing the 'useless formality'. Therefore, the non-issue of show cause notice does not vitiate the order. Therefore, the prayer in the writ petition cannot be granted.

8. The Supreme Court in the decisions relied upon by the learned counsel for the petitioner had exercised its inherent power under Art.142 of the Constitution of India to do complete justice. The High Courts while exercising power under Art.226 of the Constitution of India does not have the same power as that of Art.142; that power is exclusively given to the Supreme Court. Therefore, similar order cannot be passed in this case. Therefore, the writ petition is dismissed. No costs.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1.The Chief Engineer/Personnel
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Chennai-2.

2.The Superintending Engineer,
K.E.B.C. Kancheepuram
Electricity Department,
Kancheepuram.

+ 1 CC to Prof. S. Krishnasamy, Advocate (SR NO 2236)

+ 1 CC to Mr. V. Radhakrishnan, Advocate (SR NO 2785)

Order in WP No.2715 OF 1998

20.1.2005

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